

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALBERT MUTO	§	No. 472, 2003
	§	
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	Cr. ID No. 0210012203
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: January 21, 2004
Decided: February 12, 2004

Before **VEASEY**, Chief Justice, **BERGER** and **JACOBS**, Justices.

ORDER

This 12th day of February 2004, upon consideration of the briefs of the parties it appears to the Court that:

(1) A grand jury indicted the defendant, Albert Muto, on two counts of second-degree assault and two counts of terroristic threatening.¹ David Lukoff, Assistant Public Defender, represented Muto at a jury trial.

(2) The evidence at trial indicated that sometime between October 10 and October 17, 2002, Muto struck his mother in the face with his hand. Muto also stated that if his mother called the police he would “kill somebody.” Then, on October 19,

¹The second assault count was amended to the lesser-included charge of third-degree assault on the morning of the trial.

2002, Muto struck his sister, Virginia, with sufficient force to knock her to the ground. As Virginia was falling, she struck a piece of furniture, leaving her with a broken wrist. Virginia called for her husband, who was upstairs, and asked him to call the police and take her to the hospital. Muto then said, “Nobody’s calling the police or I’m going to kill people, starting with the grandchildren.”

(3) On January 30, 2003, Muto moved pro se to dismiss counsel and for appointment of new counsel. On February 4, 2003, Lukoff asked the court to schedule a hearing on Muto’s motion to dismiss current counsel so that the issue could be decided well in advance of trial. On March 3, 2003, Lukoff again wrote to the court, inquiring whether any additional information were needed in order to decide Muto’s motion for new counsel. On April 7, 2003, the Superior Court denied the motion. In her letter denying the motion, the trial judge stated, “You may make application to represent yourself, and if found qualified you may do so; or you may of course pay for private counsel of your choosing.” The court advised Muto that if he hired private counsel the trial date of April 22, 2003, would not be continued.

(4) On the morning of trial, Muto orally moved to dismiss Lukoff as his counsel, which motion the trial judge denied. Muto then sought to proceed pro se. After making some inquiry into Muto’s ability to represent himself, the court denied

that request. The trial proceeded with Lukoff representing Muto. The jury found Muto guilty of all charges. This is his direct appeal.

(5) Muto's first claim of error is that the Superior Court erred by denying Muto's request to proceed pro se. We review this issue de novo.²

(6) The Superior Court did not err by denying Muto's request for self-representation. The trial court struck the appropriate balance between Muto's right to represent himself and the State's interest in ensuring the integrity and efficiency of the trial process. Muto's request to proceed pro se was ambiguous, and the record demonstrates that Muto was motivated more by a desire to obtain substitute counsel or to delay the proceedings than to represent himself.

(7) A defendant's right to represent himself in a criminal proceeding is protected by the Sixth Amendment to the United States Constitution and by Article 1, Section 7 of the Delaware Constitution.³

Although the right to self-representation is fundamental, the exercise of this right is not unqualified. Before a trial court may permit a defendant to represent himself, the court must: 1) determine that the defendant has made a knowing and voluntary waiver of his constitutional right to counsel; and 2) inform the defendant of the risks inherent in going forward in a criminal trial without the assistance of legal counsel.⁴

²See *Stigars v. State*, 674 A.2d 477, 479 (Del. 1996) ("As an issue of constitutional dimension, we review de novo the trial court's denial of Stigars' request to proceed pro se.").

³*Id.*

⁴*Id.*

A defendant's right to represent himself must be balanced against his right to be represented by counsel.⁵ "When faced with an ambiguous request for self-representation, a trial court should lean in favor of the right to counsel."⁶ This approach balances the defendant's rights to counsel and to self-representation against one another as well as balancing those rights against certain governmental interests:

[T]he right to represent one's self is not absolute. For instance, the right to self-representation is not a license to disrupt the criminal calendar, or a trial in progress. After a trial has begun, the right of self-representation may be curtailed, and the trial judge considering the motion must weigh the legitimate interests of the defendant against the prejudice that may result from the potential disruption of proceedings already in progress. The United States Supreme Court has noted that even at the trial level, the government's interest in ensuring integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer.⁷

(8) The Superior Court did not err by denying Muto's request to proceed pro se. His motion was tardy. Even considering the Superior Court's delay in deciding his motion for substitute counsel, Muto had approximately two weeks between his receipt of the Court's decision, which notified Muto of his right to seek self-representation, and the first day of trial in which he could have sought to represent

⁵*Id.*

⁶*Id.*

⁷*Zuppo v. State*, 807 A.2d 545, 547-48 (Del. 2002) (footnotes omitted).

himself. Instead, Muto waited until the morning of trial to revisit the issue of substitution of counsel and to ask to proceed pro se.

(9) In addition, the record shows that Muto did not truly desire to represent himself.⁸ Rather, the record reflects that his request was motivated by either a desire to postpone the trial or a desire for substitute counsel, which the court had already denied.⁹ Despite those apparent motivations, the trial judge inquired about the defendant's capacity to represent himself. The judge determined that Muto had an eighth grade education and that he had limited familiarity with the legal system. In light of Muto's ambivalence toward proceeding pro se and the court's findings with respect to Muto's limited ability to satisfactorily represent himself, the Superior Court struck the appropriate balance between Muto's right to self-representation and his right to counsel.¹⁰

⁸The trial court suggested that Muto might be able to represent himself, if he wanted to do so. Muto replied, "Well, I'm going to have to, but I am going to need this postponed. I prefer not to. I need legal representation. . . ."

⁹The trial court was not required to grant Muto's motion for substitute counsel simply because Muto had some dissatisfaction with his appointed public defender. A defendant's "mere dissatisfaction with his counsel does not, by itself, justify the appointment of different counsel. Although an indigent person, [sic] has a right to appointed counsel on direct appeal, he does not have a right to the counsel of his choice." *In re Deputy*, No. 120, 1998, 1998 Del. LEXIS 118, at *2 (Del. Mar. 20, 1998) (ORDER). Muto's complaints about Lukoff related to their disagreements over how to handle the case. "While [a defendant has] a right to counsel without a conflict of interest, he [does] not have a right to counsel who [will] not disagree with him about how to proceed with his case. . . ." *Austin v. State*, No. 429, 2000, 2001 WL 898621, at *2 (Del. Aug. 6, 2001) (ORDER). In addition, "a defendant does not have a constitutional right to a 'meaningful relationship' with his public defender." *Id.*

¹⁰The Court also struck the appropriate balance between Muto's right to self-representation and the State's interest in ensuring the integrity and efficiency of the trial. In *Zuppo*, this Court upheld the Superior Court's denial of a defendant's request to proceed pro se because the defendant's interest in representing himself did not outweigh the State's interest in ensuring the integrity and efficiency of the trial. *Zuppo*, 807 A.2d at 549.

(10) Muto next claims that the Superior Court erred by admitting evidence of Muto's prior bad acts. He contends that the court erroneously allowed Muto's mother, sister, and brother-in-law to testify regarding Muto's prior verbal threats to and physical assaults on family members. Muto's mother testified that Muto threatened his sister, but that she had not heard the words that he used. She then stated, "but he threatened her before." Muto's sister, Virginia, testified that Muto had threatened to kill someone if anyone called the police after his assault on his mother. Virginia added, "That was the normal threat." She also stated that there had been "more than one incident" and that "this happened more than once." Virginia also testified that after Muto began living with his parents, her visits with her parents "were very curtailed, because he made it very clear, you know, with his threats and with his actions, he didn't want [Virginia and her husband] there." Virginia's husband, Douglas, testified that after Virginia fell and broke her wrist and asked Douglas to take her to the hospital, Muto told Douglas that Douglas had better not call the police, "threatening with the same type of threats that I had had before." Douglas also stated that he remembered the threats that Muto used because "it's not the first time that he had said that to us."

(11) Because Muto did not object at trial to the admissibility of the evidence he now challenges, this Court reviews the issue to determine whether the trial court

committed plain error.¹¹ “Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process. Furthermore, the doctrine of plain error is limited to material defects which are apparent on the face of the record, which are basic, serious, and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.”¹²

(12) The evidence of Muto’s prior bad acts was not sufficiently prejudicial that its admission constituted plain error in the absence of an objection by the defendant. Evidence of a defendant’s prior bad acts is not admissible to show that the defendant likely committed the crime with which he is charged.¹³ When no objection is made to evidence at trial and plain error review applies, “the prejudicial effect of the proffered evidence is often the determinative consideration” when deciding whether the evidence should have been admitted.¹⁴

¹¹*Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

¹²*Id.*

¹³DEL. UNIF. R. EVID. 404(b) (“Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.”).

¹⁴*Capano v. State*, 781 A.2d 556, 586 (Del. 2001); *see also id.* at 664 (“In the context of plain error review, the defendant must show that the error affected substantial rights. Under the federal plain error rule, the phrase ‘affecting substantial rights’ means ‘in most cases . . . that the error must have been prejudicial: It must have affected the outcome of the [trial] court proceedings.’ [C]onsistent with this Court’s plain error jurisprudence, we must decide whether the error that occurred in this case prejudiced Capano when viewed in the total context of the record relating to the . . . issue [that the defendant contends constituted plain error].”).

(13) The references to Muto’s prior threats were not so prejudicial to Muto’s case as to constitute plain error. The remarks were unsolicited statements about Muto’s prior actions, and all were vague and brief. Muto’s mother, Virginia, and Douglas each commented that Muto had made threats before, but they did not detail Muto’s prior bad acts, nor did the prosecutor elicit further testimony concerning those acts. The Superior Court did not err by failing sua sponte to strike the testimony or issue a curative instruction.¹⁵

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ E. Norman Veasey
Chief Justice

¹⁵At least some of the statements may also have been admissible as offered for a permissible Rule 404(b) purpose. Douglas referred to Muto’s earlier threats to explain how he remembered Muto’s threats during the incident with which Muto was charged, rather than to prove that Muto likely acted in conformity with his prior threats. At least one of Virginia’s references to Muto’s prior bad acts explained the contentious relationship between Muto and the other family members, which might demonstrate motive or lack of accident. *See* DEL. UNIF. R. EVID. 404(b) (“Evidence of other crimes, wrongs or acts . . . may . . . be admissible for other purposes, such as proof of motive, opportunity, intent . . . or absence of mistake or accident.”). We need not decide this issue, however.